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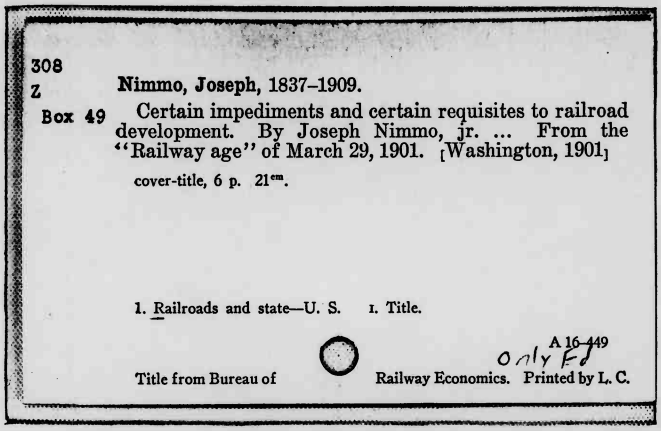

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# CERTAIN IMPEDIMENTS

AND

# CERTAIN REQUISITES

TO

# Railroad Development.

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BY JOSEPH NIMMO, JR., LL. D.

FROM THE "RAILWAY AGE" OF MARCH 29, 1901.

Dec. 29, 1911 AET

# Certain Impediments AND Certain Requisites TO Railroad Development.

By JOSEPH NIMMO, JR., LL. D.

FROM THE "RAILWAY AGE" OF MARCH 29, 1901.

In his recent able and instructive address before the Los Angeles Chamber of Commerce, Mr. Paul Morton, Second Vice President of the Atchison, Topeka and Santa Fe Railroad Company, predicted that one of three things is likely to come to pass in the railroad business of this country. "First, that pooling between the roads will be permitted by an act of Congress; or, second, that unification of ownership will come; or, third, that the government will take over the railroads of the country and operate them."

There is another possible result which Mr. Morton does not mention. I refer to the possibility that the railroads of the country, while subject to corporate ownership and management, may fall under the absolute administrative control of the Interstate Commerce Commission. Mr. Morton may have regarded this contingency as being too remote for serious consideration, and yet it appears to be a threatening danger. It was clearly proposed in Senate Bill 1439, 56th Congress, 1st Session, a bill framed by the Interstate Commerce Commission. The Commission has also during the last three years instituted a propaganda among the trade bodies of the country for the pur-

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pose of creating a coercive public sentiment likely to influence Congress in favor of its scheme, and it appears to be still actively at work on that line. I can hardly imagine any greater calamity to the commercial and transportation interests of this country than that of placing them under the control of a governmental autocracy. Such will undoubtedly be the case if the Interstate Commerce Commission shall be given absolute administrative power over the railroads without concurrent power of review by the judiciary. The ultimate elimination of the right of judicial review was just what the Commission bill provided for. That involved an enormous political heresy, namely the practical abandonment of those securities of justice which lie at the very foundation of our governmental institutions. In this respect the Commission bill was revolutionary. The general extension of such a system would evidently convert our government into an autocratic bureaucracy.

A single feature of the proposed scheme will serve to place this matter in a clear light. The Supreme Court of the United States in the Cincinnati-Chicago Freight Bureau Case (167 U. S., 479) announced the following rule of constitutional law:

> **"It is one thing to inquire whether the rates which have been charged and collected are reasonable, that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future, that is a legislative act."**

Furthermore the Supreme Court of the United States, in the Trans-Missouri Freight Association Case (166 U. S., 290), declared that when the law has spoken in regard to "a legitimate exercise of the power of Congress" the courts will not interfere. Evidently therefore if Congress shall delegate to the Interstate Commerce Commission the power to make rates for



the future, no statutory provision granting to the courts the right to review such rates would be of any avail, the power being legislative and not judicial. There remains of course the remedy provided by the constitutional provision which prohibits rates essentially confiscatory, but that remedy is evidently too remote, too uncertain and utterly inadequate to the ends of justice contemplated by our system of government.

There is a matter which, in my opinion, naturally precedes and is much more important than the permission of pooling by Congress. I refer to the necessity of so amending the anti-trust act of July 2, 1890, as to make it applicable only to contracts *unjustly* in restraint of trade. According to the decisions of the Supreme Court of the United States in the Trans-Missouri Freight Association Case and in the Joint Traffic Association Case, that act, in forbidding "every contract in restraint of trade," embraces both just or beneficent and unjust or harmful restraints. Without attempting to justify or condemn this statutory provision the court declared it to be an assertion of legislative power with which the judiciary has no power to contend. In reply to the suggestion that the evident intent of the law is "Every contract *unjustly* in restraint of trade," the court replied that the word "every" embraces both reasonable or just and unreasonable or unjust restraints, and that it cannot "read into the act by way of judicial legislation an exception not placed there by the lawmaking branch of the government." Upon this point the court also said, "The public policy of the government is to be found in its statutes," and again, "The question is, for us, one of power only, and not of policy. We think the power exists in Congress, and that the statute is therefore valid." Aside from

any question as to the soundness of this opinion the remedy for the error is evidently by statutory enactment and not by any attempt on the part of the judiciary to override an element of national sovereignty confided by the Constitution exclusively to Congress.

The right to pool or apportion traffic or the receipts from traffic would be of no practical benefit to the railroad companies so long as they are denied the right to enter into rate agreements touching competitive traffic. Historically the rate agreement preceded the pooling agreement. The latter was instituted merely as an expedient of self-government in order to secure the observance of the former. Mr. Albert Fink, the author and ablest expositor of the pooling system, so regarded it.

Rate agreements are a developed necessity of the American railroad system. They mean generally and substantially the equalization of rates, and that in practice means always stability of rates and equality of opportunity to shippers. A policy which tends to such results is sound and beneficent. The Act to Regulate Commerce clearly contemplates and is largely based upon rate agreements.

The lessons of experience have proved, however, that "pooling" is not the only effective means of securing the observance of agreed rates, and thus of maintaining the orderly conduct of the American railroad system. As clearly pointed out by Mr. Morton the unification of railroad interests has exerted a beneficent influence toward the maintenance of rates and the prevention of preferences and unjust discriminations. This has been realized to a most gratifying extent with respect to the great trunk lines east of Chicago. Of the 2,049 railroad corporations in existence in the United States on June 30, 1899, only 1,064



were operating roads, besides more than a thousand companies had gone out of existence. The Atchison, Topeka and Santa Fe System is composed of over one hundred small companies. The process of railroad unification has been going on throughout this country during the last fifty years, and it has been marked by an enormous enlargement of the means of transportation, wonderful improvements in facilities, the stability of rates and surprising reductions in the charges for transportation.

Besides, the unification of railroad interests rests securely upon an established line of governmental policy which had its origin mainly in the exigencies of the Civil War. I refer to the Act of June 15, 1866, entitled, "An Act to Facilitate Commercial, Postal and Military Communication among the States." This act provides:

> "That every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges and ferries all passengers, troops, government supplies, mails, freight and property on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination."
>
> R. S., Sec. 5258.

This act, very properly, has been designated as "The Charter of the American Railroad System." The unification of the railway postal service was its first and most beneficent expression. The Act of June 15, 1866, was re-enforced by the Act to Regulate Commerce, approved February 4, 1887. Section 6 of the latter act not only recognizes but requires the railroad companies to maintain established joint rates involving the unification of traffic. Section 7 of the same act also specifically provides for continuous traffic over connecting lines, and clearly authorizes agreements

and combinations involving the common use of tracks, cars, locomotives and depots, and the harmonious management of the entire apparatus of railroad equipment, by prohibiting any act which would tend to prevent such practical unification of the entire interstate railroad system of the United States. The recently formed railroad affinities are the logical outcome of this governmental policy, which thus far, in its practical workings, has proved to be in the highest degree promotive of the public interests.

In view of the foregoing and the expressed opinion of the federal judges as to the legal significance of the word "every" as it occurs in the first section of the anti-trust Act of July 2, 1890, it appears that the first step in the direction of reform is the amendment of that act so that it shall apply only to unjust restraints upon trade or commerce. As it stands it serves only to make the whole anti-monopoly movement ridiculous. We are all tethered in a thousand ways for our mutual benefit and protection. Any scheme of regulation which proscribes just and beneficent restraints upon human interaction is manifestly a solecism in the exercise of governmental powers. The general adoption of such a policy would be subversive of justice and order. There can be no beneficent legislation for the suppression of monopolies detrimental to the public interests until the distinction has been clearly drawn between just and unjust restraints upon the freedom of contract. Evidently, therefore, the first step to be taken in vindication of industrial freedom and the suppression of baneful combinations in restraint of trade is the correction of that inadvertent legislative error of the Act of July 2, 1890, which places just and unjust restraints upon human interaction under one category of *mala prohibita*.

* * * * * * * * *

**The following are the main points of the foregoing article:**

1. To confer the power of rate making upon the Interstate Commerce Commission would eliminate the right of the Courts to review such procedure and render the orders of the Commission practically autocratic. This should be resisted.

2. The Anti-trust Act of July 2, 1890, ought to be so amended as to permit agreements justly and beneficially in restraint of trade.

3. The unification of the American Railroad system rests securely upon a line of governmental policy and thus far has been abundantly justified of its results. So long as it tends toward progress and the development of the natural resources and the commercial and industrial interests of the country it should not be arrested.

I earnestly request that any person to whom this article may be sent will freely offer to me any criticism which may occur to him upon the above points, or in regard to any statement of fact or of opinion in the body of the article.

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1831 F St. Northwest,
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April 22, 1901.

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SPECIAL ATTENTION GIVEN TO QUESTIONS IN REGARD TO

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